

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KATHLEEN R. HACKLER, formerly known
as KATHLEEN R. ROMERO,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY; DOES 1-X,
inclusive; ABC Corporations, inclusive;
and XYZ PARTNERSHIPS, inclusive,

Defendants.

Case No. 3:14-cv-00531-MMD-VPC

ORDER

(Pl.'s Motion for Partial Summary
Judgment – ECF No. 24;
Def.'s Motion for Partial Summary
Judgment – ECF No. 37)

I. SUMMARY

Plaintiff Kathleen R. Hackler is suing Defendant State Farm Mutual Automobile Insurance Company (“State Farm”) and various unnamed defendants for breach of contract and a number of related claims. Hackler now moves for partial summary judgment on her claims that State Farm violated the Nevada’s unfair trade practices statute, NRS § 686A.310, as well as and NRS § 690B.012 (“Hackler’s Motion”). (ECF No. 24.) State Farm has moved for partial summary judgment on Hackler’s claims for breach of the duty of good faith and fair dealing, insurance unfair trade practices, and intentional infliction of emotional distress (“State Farm’s Motion”). (ECF No. 37.)¹ The Court has reviewed the parties’ respective responses (ECF Nos. 38, 44) and replies (ECF Nos. 42, 55).

For the reasons discussed below, Hackler’s Motion is denied and State Farm’s Motion is granted in part and denied in part.

¹Neither party seeks summary judgment on Heckler’s claims for breach of contract or breach of fiduciary duty.

II. BACKGROUND

In October 2010 Hackler was insured by a State Farm automobile insurance policy (“the Policy”). (ECF No. 1-1 ¶ 4.) Among other things, the Policy provided coverage for damage caused by an underinsured driver up to \$50,000. (*Id.*; ECF No. 37 at 8.)

On October 8, 2010, Hackler was involved in a three vehicle accident that left her with significant injuries. (ECF No. 1-1 ¶ 7; ECF No. 37 at 7.) In December 2012 and May 2013, the two other motorists’ insurance companies tendered their respective policy limits (\$100,000 and \$50,000) to Hackler. (ECF No. 1-1 ¶ 8.) Hackler sought the additional coverage of her own policy’s underinsured driver provisions and submitted a policy limit demand on December 13, 2013. (ECF No. 25 ¶ 6.)

Hackler alleges State Farm did not respond to her demand, and so she filed this lawsuit in state court, asserting claims for breach of contract, breach of the duty of good faith and fair dealing, unfair trade practices in violation of NRS § 686A.310, breach of fiduciary duty, and intentional infliction of emotional distress. (ECF No. 24 at 7-7.) State Farm removed the case to this Court. (ECF No. 1.)

The parties now move for partial summary judgment on a number of claims.

III. LEGAL STANDARD

“The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). An issue is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is “material” if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not

1 appropriate. See *id.* at 250-51. “The amount of evidence necessary to raise a genuine
2 issue of material fact is enough ‘to require a jury or judge to resolve the parties’ differing
3 versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir.
4 1983) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89
5 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all
6 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
7 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

8 The moving party bears the burden of showing that there are no genuine issues
9 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
10 order to carry its burden of production, the moving party must either produce evidence
11 negating an essential element of the nonmoving party’s claim or defense or show that
12 the nonmoving party does not have enough evidence of an essential element to carry its
13 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
14 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s
15 requirements, the burden shifts to the party resisting the motion to “set forth specific
16 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The
17 nonmoving party “may not rely on denials in the pleadings but must produce specific
18 evidence, through affidavits or admissible discovery material, to show that the dispute
19 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do
20 more than simply show that there is some metaphysical doubt as to the material facts.”
21 *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus.*
22 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “The mere existence of a scintilla
23 of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S.
24 at 252.

25 Further, “when parties submit cross-motions for summary judgment, ‘[e]ach
26 motion must be considered on its own merits.’” *Fair Hous. Council of Riverside County,*
27 *Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W.
28 Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139

1 F.R.D. 441, 499 (Feb. 1992) (citations omitted). “In fulfilling its duty to review each
 2 cross-motion separately, the court must review the evidence submitted in support of
 3 each cross-motion.” *Id.*

4 **IV. DISCUSSION**

5 **A. Hackler’s Motion**

6 Hackler seeks summary judgment on two claims: violation of Nevada unfair trade
 7 practices (NRS § 686A.310) and violation of the Nevada prompt payment statute (NRS
 8 § 690B.012). These claims both fall under the third claim for relief identified in her
 9 Complaint. (ECF No. 1-1 at 7-8.)

10 **1. NRS § 686A.310**

11 NRS § 686A.310 lists a number of activities that are considered unfair practices
 12 in the context of insurance. Hackler argues that State Farm has violated subsections
 13 (b), (c), (d), (e), (f), (k), and (n), which prohibit the following:

14 (b) Failing to acknowledge and act reasonably promptly upon
 15 communications with respect to claims arising under insurance policies.

16 (c) Failing to adopt and implement reasonable standards for the
 17 prompt investigation and processing of claims arising under insurance
 18 policies.

19 (d) Failing to affirm or deny coverage of claims within a
 20 reasonable time after proof of loss requirements have been completed
 21 and submitted by the insured.

22 (e) Failing to effectuate prompt, fair and equitable settlements of
 23 claims in which liability of the insurer has become reasonably clear.

24 (f) Compelling insureds to institute litigation to recover amounts
 25 due under an insurance policy by offering substantially less than the
 26 amounts ultimately recovered in actions brought by such insureds, when
 27 the insureds have made claims for amounts reasonably similar to the
 28 amounts ultimately recovered.

[...]

(k) Delaying the investigation or payment of claims by requiring an
 insured or a claimant, or the physician of either, to submit a preliminary
 claim report, and then requiring the subsequent submission of formal
 proof of loss forms, both of which submissions contain substantially the
 same information.

[...]

(n) Failing to provide promptly to an insured a reasonable
 explanation of the basis in the insurance policy, with respect to the facts
 of the insured's claim and the applicable law, for the denial of the claim
 or for an offer to settle or compromise the claim.

NRS § 686A.310.

1 State Farm's response is two-fold. First, State Farm argues Nevada law makes it
2 clear that an insurance company cannot be held liable for the unfair practices listed
3 above unless "an officer, director or department head of the insurer ha[d] knowingly
4 permitted" an unfair practice. (ECF No. 38 at 2 (citing NRS § 686A.270).) Second, State
5 Farm argues that the record contains sufficient evidence to create material disputes of
6 fact as to each subsection listed above.

7 The Court agrees with State Farm's first line of argument. The unfair practices
8 statute clearly requires proof that an officer, director or department head was aware of
9 the violations. NRS § 686A.270; *see also Yusko v. Horace Mann Servs. Corp.*, No.
10 2:11-CV-00278-RLH, 2012 WL 458471, at *4 (D. Nev. Feb. 10, 2012) (granting
11 summary judgment where plaintiff had not presented any evidence that an officer,
12 director or department head was aware of the conduct in question). Hackler has not
13 produced any such evidence, and therefore she has failed to meet her initial burden on
14 summary judgment.

15 Hackler argues that State Farm's Claims Team Managers qualify as department
16 heads under NRS § 686A.270. (ECF No. 42 at 7.) Such a reading is inconsistent with
17 the plain language of the statute and the doctrine of *noscitur a sociis* — which counsels
18 that words in a statute should be understood in the context of the words around them.
19 *See Bldg. Energetix Corp. v. EHE, LP*, 294 P.3d 1228, 1234 (Nev. 2013). If the
20 legislature wanted to include managers in the list of officials, they likely would have
21 included the term manager. Additionally, the two other positions in the list — officer and
22 director — are senior positions within a company and are typically limited to a small
23 number of individuals. The doctrine of *noscitur a sociis* suggests that a department head
24 should be understood similarly. Expanding its reach to team managers is inconsistent
25 with such an understanding.

26 For these reasons, Hackler's Motion is denied as it relates to her claims based
27 on NRS § 686A.310.

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1 **2. NRS § 690B.012**

2 NRS § 690B.012, sometimes referred to as the prompt payment statute, requires
3 insurance providers to approve or deny a claim within 30 days, or notify the policyholder
4 that it needs additional information or time and explain why.

5 Hackler argues that it is clear from the record that State Farm did not comply with
6 the provisions of NRS § 690B.012. In response, State Farm argues that the statute
7 does not create a private right of action for violation of NRS § 690B.012.

8 The Nevada Supreme Court has clearly held that “there is no private right of
9 action in the district court under the statute.” *Allstate Ins. Co. v. Thorpe*, 170 P.3d 989,
10 991 (Nev. 2007). Hackler attempts to parse the holding of *Thorpe*, but the language on
11 which she relies does not help her case. She argues that the Nevada Supreme Court
12 expressly limited its ruling when it said: “We note that our ruling today does not
13 foreclose actions for tortious and contractual bad faith against first party insurers. It
14 simply restricts recovery of payments and interest under NRS 690B.012 to the
15 administrative realm.” (ECF No. 42 at 21 (quoting *Thorpe*, 1290 P.3d at 996).) However,
16 the Supreme Court was simply making clear that parties like Hackler could still recover
17 for undue delays through other causes of action — as Hackler is doing in this case —
18 but NRS 6§ 90B.012 provides only an administrative remedy. In other words, the
19 conduct at issue was actionable, just not through a particular legal avenue.

20 Therefore, Hackler’s Motion is denied as it relates to NRS § 690B.012.

21 **B. State Farm’s Motion**

22 State Farm moves for summary judgment on three claims: breach of the
23 covenant of good faith and fair dealing, violation of Nevada unfair trade practices (NRS
24 § 686A.310), and intentional infliction of emotional distress (“IIED”). State Farm
25 additionally seeks a ruling that it is not liable for punitive damages.

26 **1. Good Faith and Fair Dealing**

27 Nevada law holds that “[e]very contract imposes upon each party a duty of good
28 faith and fair dealing in its performance and its enforcement.” *A.C. Shaw Constr., Inc. v.*

1 *Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts §
2 205). “When one party performs a contract in a manner that is unfaithful to the purpose
3 of the contract and the justified expectations of the other party are thus denied,
4 damages may be awarded against the party who does not act in good faith.” *Hilton*
5 *Hotels v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 923 (Nev. 1991). To succeed on a
6 cause of action for breach of the covenant of good faith and fair dealing, a plaintiff must
7 therefore show: (1) the plaintiff and defendant were parties to an agreement; (2) the
8 defendant owed a duty of good faith to the plaintiff; (3) the defendant breached that duty
9 by performing in a manner that was unfaithful to the purpose of the contract; and (4) the
10 plaintiff's justified expectations were denied. *Id.*; see also *Pemberton v. Farmers Ins.*
11 *Exch.*, 858 P.2d 380, 384 (Nev. 1993). ([A]n insured may institute a bad faith action
12 against his or her insurer once the insured establishes “legal entitlement” and
13 unreasonable conduct by the insurer concerning its obligations to the insureds.”).

14 State Farm argues that the record unambiguously shows it never denied
15 Hackler's claim and acted reasonably during the entirety of claim processing, which in
16 turn means that Hackler cannot show the third and fourth elements of her claim. (ECF
17 No. 37 at 31.)

18 Hackler responds that failing to decide a claim for years is functionally equivalent
19 to denying it. (ECF No. 44 at 17-18 (citing *Pioneer Chlor Alkali Co. v. Nat'l Union Fire*
20 *Ins. Co.*, 863 F. Supp. 1237, 1250 (D. Nev. 1994).) Hackler also argues that a finding of
21 bad faith can stem from State Farm's insufficient investigation of her claims. (*Id.* at 19
22 (citing *Skach v. AAA N. California, Nevada & Utah Ins. Exch.*, No. 3:12-CV-00464-RCJ,
23 2013 WL 1104744, at *3 (D. Nev. Mar. 7, 2013).) Lastly, Hackler submits that the
24 delays, inadequacy of State Farm's investigation, and interactions between herself and
25 State Farm in the record at the very least show a material dispute of fact about whether
26 State Farm's performance was “unfaithful to the purposes of the contract.”

27 The Court agrees that Hackler has identified a genuine material dispute of fact
28 sufficient to prevent summary judgment on this claim. As is evident from the parties'

1 briefs, there is a great deal of disagreement about what the record shows regarding the
2 quality of State Farm's investigation into Hackler's underinsured motorist claim.
3 (*Compare* ECF No. 37 at 7-25 with ECF No. 44 at 5-15.) Hackler alleges, and has
4 produced evidence to support the contention, that State Farm was obligated to
5 investigate and process her UIM claim after she completed the relevant paperwork on
6 December 6, 2010, but failed to take action for years. State Farm argues that it
7 attempted to process the claim but was unable to reach Hackler or her previous
8 attorney, and therefore closed the file on the UIM claim in May 2012. (ECF No. 37 at
9 14.) State Farm eventually reopened the claim after Hackler's attorney inquired about it
10 in 2014. (*Id.* at 15.) Hackler argues that even after State Farm reopened its investigation
11 into her UIM claim, it ignored letters, required her to complete duplicative forms, and
12 delayed its investigation. (ECF No. 44 at 10-12.) State Farm argues at length that
13 Hackler cannot show bad faith because she cannot show a decision to deny benefits.
14 (See ECF No. 55 at 4-5.) However, as courts in this district and elsewhere have
15 recognized, sitting on a claim for an extended period is functionally equivalent to a
16 denial. See, e.g., *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 434 (9th Cir. 2011)
17 (discussing California law); *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915,
18 923 (9th Cir. 2008) (discussing Arizona law); *Skach*, 2013 WL 1104744, at *3. As such,
19 the Court finds State Farm's understanding of the requirements of showing bad faith
20 needlessly narrow. A reasonable fact-finder could conclude that State Farm performed
21 in a manner that was unfaithful to the spirit of its agreement with Hackler and denied her
22 reasonable expectations through its delay and inadequate investigation.

23 State Farm's Motion is therefore denied with respect to the claim for breach of
24 the covenant of good faith and fair dealing.

25 **2. Unfair Trade Practices**

26 The Court agrees with State Farm that Plaintiff fails to offer evidence to show
27 knowledge of the violations by the individual holding the positions listed in NRS §
28 686A.310 in order for the insurance company to be liable. (See discussion *supra* Sect.

1 IV(A)(1).) Furthermore, for the reasons discussed above NRS § 690B.012 does not
2 create a private right of action. (*Id.* at Sect. IV(A)(2).) Therefore, State Farm's Motion is
3 granted with respect to Hackler's claims based on NRS § 686A.310 and § NRS
4 690B.012 (identified as her third claim for relief in the Complaint).

5 **3. Intentional Infliction of Emotional Distress (IIED)**

6 "The elements of a cause of action for intentional infliction of emotional distress
7 are '(1) extreme and outrageous conduct with either the intention of, or reckless
8 disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or
9 extreme emotional distress and (3) actual or proximate causation.'" *Dillard Dep't Stores,*
10 *Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999). Conduct is extreme or outrageous if it
11 is atrocious, beyond all possible bounds of decency, and utterly intolerable. *Churchill v.*
12 *Barach*, 863 F.Supp. 1266, 1275 (D.Nev.1994)

13 State Farm argues that, even evaluating its actions in the light most favorable to
14 Hackler, it has not engaged in, and the record does not show, the type of "extreme and
15 outrageous conduct . . . outside all possible bounds of decency" that is required to prove
16 a claim for IIED. (ECF No. 37 at 32-33 (citing *Maduikie v. Agency Rent-A-Car*, 114 Nev.
17 1 (1998).) State Farm also points to a number of cases outside of Nevada wherein
18 courts have held that bad faith behavior by insurance providers does not amount to
19 IIED. (*Id.*) It argues that this Court should determine that, though it has not yet done so,
20 the Nevada Supreme Court would also hold that bad faith actions by insurance
21 providers do not amount to extreme or outrageous conduct as a matter of law.

22 Hackler argues Nevada case law suggests that insurers' misconduct may make
23 them susceptible to an IIED claim, and that the record provides ample bases for a
24 reasonable juror to conclude that State Farm engaged in conduct outside the bounds of
25 decency. (ECF No. 44 at 29-32.)

26 The Court cannot find that, when viewed in the light most favorable to Hackler, a
27 reasonable juror could not find State Farm's conduct extreme or outrageous. Although
28 the Nevada Supreme Court has not definitively spoken on the issue, other jurisdictions

1 have allowed IIED claims to move forward based on the bad faith actions of insurers.
 2 See, e.g., *Young v. Allstate Ins. Co.*, 198 P.3d 666, 692 (Haw. 2008); cf. *Weinstein v.*
 3 *Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1248 (Idaho 2010) (unreasonable
 4 delay in paying uninsured motorist claim constituted bad faith where plaintiffs suffered
 5 severe emotional distress from financial stress); *Cassidy v. Millers Cas. Ins. Co.*, 1
 6 F.Supp.2d 1200, 1203-04, 1213 (D.Colo.1998) (insurer's alleged "pattern of conduct"
 7 that recklessly caused severe emotional distress was outrageous because the conduct
 8 included forcing the claimants into unnecessary litigation and arbitration). Additionally,
 9 as both the cited courts and Hackler have noted, the relationship between an insurer
 10 and an insured who has suffered a serious injury may support a finding of outrageous
 11 conduct when the insurer is aware of the insured's vulnerable condition. Hackler has
 12 pointed to sufficient evidence to create a disputed question of fact about the nature of
 13 State Farm's conduct.

14 State Farm's Motion is denied with respect to Hackler's IIED claim.

15 **4. Punitive Damages**

16 In Nevada, punitive damages are available only where "it is proven by clear and
 17 convincing evidence that the defendant has been guilty of oppression, fraud, or malice,
 18 express or implied," and is available in such circumstances "for the sake of example and
 19 by way of punishing defendant." NRS § 42.005 (2009). Nevada law defines "oppression"
 20 as "despicable conduct that subjects a person to cruel and unjust hardship with
 21 conscious disregard of the rights of the person," NRS § 42.001(4) (2009); "fraud" as "an
 22 intentional misrepresentation, deception or concealment of a material fact known to the
 23 person with the intent to deprive another person of his rights or property or to otherwise
 24 injure another person," NRS § 42.001(2) (2009); and "malice, express or implied" as
 25 "conduct which is intended to injure a person or despicable conduct which is engaged in
 26 with a conscious disregard of the rights or safety of others," NRS § 42.001(3) (2009).
 27 The Nevada Supreme Court has further defined oppression as "a conscious disregard

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1 for the rights of others which constitutes an act of subjecting plaintiffs to cruel and unjust
2 hardship.”

3 In *Guar. Nat. Ins. Co. v. Potter*, 912 P.2d 267 (Nev. 1996), the Nevada Supreme
4 Court upheld an award of punitive damages in a case where an insurance company
5 acted in bad faith in processing an uninsured motorist claim. The court held that the
6 insurer’s actions were “willful, intentional and done in reckless disregard of the
7 consequence” to the plaintiffs. *Id.* at 273.

8 State Farm argues that there is no evidence in the record to support a finding
9 that it had the specific intention to harm Hackler, and that the evidence, even viewed in
10 the light most favorable to Hackler, shows it at least intended to adequately and fairly
11 adjust her claims. (ECF No. 37 at 35-36.) Hackler counters that she need only show
12 implied malice and that the record contains ample examples upon which a fact finder
13 could conclude that State Farm consciously disregarded her rights. (ECF No. 44 at 32-
14 33.)

15 Viewing the record in the light most favorable to Hackler, the Court finds that a
16 reasonable juror could conclude that State Farm acted with implied malice. As in *Potter*,
17 the record contains a long back-and-forth between insurer and insured over an
18 uninsured motorist claim and a series of decisions and delays that a fact finder could
19 consider evidence of a reckless disregard for Hackler’s rights under the Policy.

20 Therefore, State Farm’s Motion is denied as it pertains to punitive damages.

21 **V. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several
23 cases not discussed above. The Court has reviewed these arguments and cases and
24 determines that they do not warrant discussion because they do not affect the outcome
25 of the parties’ Motions.

26 It is therefore ordered that Hackler’s Motion for Partial Summary Judgment (ECF
27 No. 24) is denied.

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1 It is further ordered that State Farm's Motion for Partial Summary Judgment
2 (ECF No. 37) is granted in part and denied in part. The motion is granted with respect to
3 Hackler's third claim for relief based on NRS § 686A.310 and NRS § 690B.012. It is
4 denied in all other respects.

5 DATED THIS 26th day of September 2016.

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MIRANDA M. DU
9 UNITED STATES DISTRICT JUDGE
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